IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SCOTT R. KIMBALL, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner, Social Security Administration, Defendant.	No. CV 06-6318-HU FINDINGS AND RECOMMENDATION

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HUBEL, Magistrate Judge:

Scott Kimball brought this action pursuant to Section 205(g) of the Social Security Act (the Act), 42 U.S.C. § 405(g), to obtain judicial review of a final decision of the Commissioner of the Social Security Administration (Commissioner) denying his applications for disability benefits under Title II, and Supplemental Security Income (SSI) benefits under Title XVI, of the Social Security Act.

Procedural Background

Mr. Kimball filed an application for benefits on April 8, 2003, alleging disability since December 1, 1997, from bipolar disorder and post-traumatic stress disorder (PTSD). The applications were denied initially and on reconsideration. A hearing was held on July 19, 2005, before Administrative Law Judge (ALJ) William Philip Horton. On October 25, 2005, the ALJ issued a decision in which he determined that Mr. Kimball's earliest possible onset date under the current application was March 14, 1999. The ALJ found Mr. Kimball not disabled. The Appeals Council denied Mr. Kimball's request for review on October 27, 2006, making the ALJ's decision the Commissioner's final decision.

Mr. Kimball was 39 years old at the time of the ALJ's decision. He has a high school education and two years of college. His past relevant work is as a cabinet-maker, delivery driver and tree trimmer helper.

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Medical Evidence

In May 1991, Mr. Kimball was admitted to Bridgewater State Hospital in Massachusetts after being charged with carrying a firearm without a license and disturbing the peace. Tr. 214. Roderick Anscombe, M.D., conducted a court ordered evaluation of Mr. Kimball, and met with him on two occasions, May 3, 1991 and May 16, 1991. Id.

According to Dr. Anscombe's report, on admission, Mr. Kimball was described as grandiose with delusional beliefs and loosely associated thoughts. Tr. 216. His thinking presented as extremely accelerated and his reality testing and judgment were partially impaired. His mood was described as hypomanic. Id. Subsequent to his admission, he showed no further symptoms of mood disorder or psychosis, and was housed on a minimum security unit with no reports of behavior indicating attempts to harm himself or others. Id.

After interviewing Mr. Kimball, Dr. Anscombe concluded that he showed "a long deteriorating course of withdrawal from social contact, increasingly odd ideas, poor work performance in jobs below his previous intellectual capabilities, and episodes of odd behavior which typically precede the onset of schizophrenia." Tr. 219. Dr. Anscombe did not think Mr. Kimball's symptoms reached the level of schizophrenia at that time, and concluded that Mr. Kimball was "best diagnosed as schizotypal personality." Id. Dr. Anscombe thought Mr. Kimball also showed indications of manic depressive illness. Id. At the time of the arrest, Dr. Anscombe thought Mr.

Kimball suffered from the major mental illness of schizophreniform psychosis, a condition which had, by the time of his discharge from the hospital, largely remitted. Tr. 220.

Mr. Kimball's medical records resume in 1997. He received treatment at PeaceHealth Medical Group's Mental Health Match in 1997 and 1998.

On December 3, 1997, Mr. Kimball was given a psychiatric evaluation on referral from his therapist. Tr. 145. Mr. Kimball reported a long term history of mental illness from kindergarten to the present. He described his symptoms as major mood swings, with periods of mania and depression, and "crippling anxiety." Id. Mr. Kimball also reported severe anger and rage though he had not acted on these feelings. He reported extreme suicidal ideation, but no plan. Id. He agreed to accept a trial of lithium and was given a prescription. Tr. 146.

A chart note dated March 10, 1998 and signed by Libby Churchill, psychiatric nurse practitioner, relates that Mr. Kimball reported having some toxic symptoms from lithium over the past several weeks and wanting to discontinue the lithium. Tr. 143. Mr. Kimball said he had been attending a bipolar support group and would like a trial of other medications. Id.

Mr. Kimball reported that he was still very depressed at times, living "like a hermit" and generally avoiding others. Ms. Churchill observed that Mr. Kimball's speech was rather pressured though he was "less anxious and agitated [than] when he was seen

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prior to lithium trial." There was no evidence of psychotic symptoms. Id. Mr. Kimball was started on a trial of Depakote. Id.

On March 31, 1998, Ms. Churchill recorded that Mr. Kimball reported tolerating the Depakote very well. Tr. 144. He was still noticing some cycling, but denied side effects and said his sleep was better. He reported a decrease in violent thoughts, but said he was still having difficulty tolerating anxiety when he was in social situations. Id.

Mr. Kimball began treatment with William R. Balsom, M.D. on February 17, 1998. Tr. 170. Dr. Balsom noted Mr. Kimball's history of bipolar illness, currently being treated through Lane County Mental Health, and that Mr. Kimball had been on lithium for the past two months as well as other antidepressants which he did not tolerate. Id. Dr. Balsom noted that Mr. Kimball's medical history was "otherwise fairly benign," and treated him for tendinitis, tr. 168, and viral gastroenteritis, tr. 169. On February 9, 2001, Mr. Kimball came in for depression, saying he had been off all medications except having recently started thyroid medication. Tr. 168. During the previous week had begun to notice that he was sleeping poorly, with anxiety and hypertension symptoms. Id. Dr. Balsom discussed at some length his history of cycles and presentation of manic depression, and decided to restart medication, with Klonopin at bedtime and Depakote. Id.

On February 25, 2002, Mr. Kimball reported he was feeling less agitated and anxious on the Depakote, and had had no manic

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episodes. Tr. 167. Dr. Balsom thought his bipolar illness was improving on the Depakote. Id.

On March 4, 2002, Dr. Balsom wrote that Mr. Kimball continued on the Depakote and Armour thyroid, with the bipolar illness being "improved" on Depakote, but "not optimally." Id. Dr. Balsom increased the Depakote dosage. Id.

On March 18, 2002, Mr. Kimball reported having some persistent mild symptoms of mania, resolved when his Depakote dosage was increased. Tr. 166. On July 9, 2002, Dr. Balsom noted that Mr. Kimball was continuing on Levoxyl for hypothyroidism and Depakote. Tr. 165. Mr. Kimball reported that generally his mood was stable, but that he did have occasional episodes of depression,irritability and rage. Id. On August 27, 2002, Dr. Balsom wrote that Mr. Kimball's manic depression was stable on his current dose of Depakote. Tr. 164. Dr. Balsom decreased the dose of Paxil to avoid over-sedation. Id. Dr. Balsom wrote that Mr. Kimball said he was "considering filing for disability," and that Dr. Balsom had "discouraged him from doing this as I think he is able bodied and could work full time if he had the appropriate kind of work." Id.

On August 21, 2003, Mr. Kimball was evaluated by H.F. Shellman, Ph.D. Tr. 187. Mr. Kimball was not in counseling at that time, having last received treatment from a private therapist two to three months earlier. Id. Mr. Kimball described a cycle of mood swings involving agitation, confusion and anger. Id. At such times he felt deeply depressed. Id. He said that two to three times a year, he developed mania, but his usual cycle ran from feeling

normal to depression, with periods of mania becoming less frequent as he got older. Id. He had suicidal ideation. Id.

He was currently taking Lamictal, Seroquel, and Clonazepam. Id. Dr. Shellman observed Mr. Kimball's speech to be slightly rapid, but of normal rhythm and without evidence of thought blocking, flight of ideas, tangentiality or circumstantial ideation. Tr. 189. His affect was appropriate to a slightly anxious mood. He denied current hallucinations and delusional ideation. Id.

Mr. Kimball related that he had worked part-time doing yard work for the past three years; before that he had worked sporadically as a taxicab driver, for a tree service, doing odd jobs in a bakery, and as a house painter. Id.

Mr. Kimball described his mental symptoms to Dr. Shellman as including, among other things, problems at work, depression, loss of appetite, difficulty sleeping, problems with concentration and memory functioning, confusion, quick change of mood, ruminating about problems, problems with breathing, tachycardia, upset stomach, sweating, nightmares, suicidal thoughts, homicidal thoughts, problems controlling anger or urges, feelings of worthlessness, withdrawal from others, anhedonia, and feeling negative about the future. Tr. 190.

Dr. Shellman diagnosed Bipolar I Disorder, most recent episode depressed, moderate. Id. In Dr. Shellman's opinion, Mr. Kimball's presentation and demeanor were consistent with the records reviewed and his allegations. Tr. 191. In view of Mr. Kimball's long history

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with bipolar disorder, Dr. Shellman considered his prognosis guarded. Id.

On September 11, 2003, Dorothy Anderson, Ph.D., a psychologist, did a records review, affirmed by another psychologist, Paul Rethinger, Ph.D., on November 14, 2003. Tr. 193. In her opinion, Mr. Kimball had moderate limitations in several areas, including the ability to understand and remember detailed instructions, maintain attention and concentration for extended periods, work in coordination with others without being distracted by them, interact appropriately with the general public, get along with coworkers, maintain social function, maintain concentration, persistence, or pace, and set realistic goals. Tr. 193-94, 207. Dr. Anderson concluded that Mr. Kimball had the ability to sustain a normal work day and work week, although he was limited to "simple, predictable" tasks, and would function best with only occasional interaction with coworkers and the public. Tr. 195.

On June 1, 2004, Mr. Kimball saw Dr. Balsom, after a two-year break in treatment while Mr. Kimball was seeing a naturopath. Tr. 222. He was currently on Armour Thyroid and Depakote. Dr. Balsom noted that the previous year, Mr. Kimball had been tried on Remeron, Lamictal and Seroquel without improvement, and with significant adverse reactions. Id.

On June 20, 2005, Sandra Kalnins, D.O., a psychiatrist, prepared a summary of her psychiatric treatment of Mr. Kimball. Tr. 228. She recorded that Mr. Kimball had been seeing her for several years for treatment of bipolar disorder, having tried both

prescription and natural mood stabilizers. Dr. Kalnins wrote,

> Scott has had periods of time when he has fewer mood swings and disturbing thoughts, but has never had prolonged relief from these symptoms. He generally has shifts between significant depression and higher energy and irritability. He will frequently have violent images and thoughts in his head, particularly about people he interacts with. He does not act on these, but these experiences make it difficult for him to be around people. Antipsychotic medicines do little to stop these experiences. Antidepressant medications have not been helpful.

Id. Dr. Kalnins noted that Mr. Kimball had been able to do "limited work," but "only because he has had an unusual amount of flexibility with the jobs." Id. She wrote that Mr. Kimball had done landscaping and yard work "where he has total control over his jobs and hours," and could cancel the work when he had mood or thinking difficulties. Id. He was currently working for a cabinetmaker, and "[s]o far, his boss is extremely flexible with Scott's work hours, but this may not be sustainable over the long term." Id.

In Dr. Kalnins's opinion, Mr. Kimball was "totally and permanently psychiatrically disabled." Id. She wrote that because he was "intelligent and resourceful," he appeared "on the surface" to be "much more stable and functional than his chronic mental illness truly allows." Id. In her opinion, Mr. Kimball had been able to "mask much of the mood instability and extremely disturbing thoughts and images." Id.

Dr. Kalnins wrote that Mr. Kimball had been "very motivated to try different treatments" for his bipolar disorder, but that none had been consistently helpful. She concluded, "Scott has good coping skills and intelligence, but remains impaired by the Bipolar

Disorder. I expect him to continue to have difficulties working." Id.

On June 21 and June 28, 2005, Mr. Kimball was given a comprehensive psychological evaluation by David R. Truhn. Tr. 229. Dr. Truhn administered the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III), the Minnesota Multiphasic Personality Inventory-II (MMPI-II), and Comprehensive Trail Making Test, as well as conducting a mental status examination, a clinical review, and a records review. Id.

Mr. Kimball reported a history of bipolar affective disorder, and said he had been depressed for the last several weeks, with the depression leading to a lack of motivation or interest in accomplishing any tasks or activities, excessive worry and fear, and emotional vulnerability. Id. During major manic episodes, which occurred every two to three years and lasted for months at a time, he had increased energy level, hallucinations and delusions, felt "ridiculously positive," became very creative, and embarked on major projects. During such episodes he felt as if he were a god, and "everything would seem to point to symbols that would ... forecast ... his future." Tr. 230.

Mr. Kimball said auditory hallucinations have persisted at times, consisting of voices saying he was crazy when he was depressed. During those times he takes medication, but that the symptoms might last for a week, and then he might not experience them for months at a time. Id. He reported that his last major manic episode had been a few months previously. But when he is in

a depressive episode, he does not interact with many people and often loses interest in doing things. Id. Mr. Kimball reported that he is angry and irritable most of the time because "I felt so bad about my illness." Id. He experiences increasing worry about day to day activities, where he becomes hot and his heart races for no reason. The episodes occur more than once a week. Id.

Mr. Kimball was currently working part-time, as a cabinet-maker, and had done so for the past year. Tr. 231-32. He said he worked about 25 hours a week, averaging five hours a day. Tr. 232. Some days he did not show up for work, and other days he came in late or left early if he was depressed. He characterized his employer as supportive. Id.

Mr. Kimball was taking Depakote prescribed by Dr. Kalnins, but said the Depakote managed "the major mania but nothing else." Tr. 233. He continues to have breakthrough symptoms, despite the medication. Id. He takes Klonopin and Lorazepam as needed when he feels "volatile [or] hypersensitive," or when he is "overreacting to everything." Id. He tries not to take them because he is concerned about their addictive qualities. Id. Psychometric testing revealed that on the WAIS-III, Mr. Kimball had full scale I.Q. of 103, average. Tr. 234. There was significant scatter on the Verbal Sphere and the Performance Sphere, indicating to Dr. Truhn that Mr. Kimball had specific strengths and weaknesses or possible issues in cognitive functioning. Id. He did seem to have a significant weakness in the ability to transcribe written material, but had absolute strengths in general fund of knowledge and long-term

memory and abstract reasoning. Id. During the WAIS-III, Mr. Kimball "seemed to have difficulty following simple directions on a test of knowledge and use of vocabulary words." Id. He worked slowly; testing took approximately 25% longer than usual. Id. A fine tremor was noticed in his hand during a test of visuospatial relationships. Tr. 235. He maintained minimal eye contact and his affect was generally flat during the testing. Id.

Neuropsychological screening indicated cognitive deficits. Dr. Truhn thought there was a "strong chance that issues such as a thought disorder had impaired his ability to concentrate during the testing." Id.

Dr. Truhn reviewed both Dr. Kalnins's records and the evaluation done in 1991 by Dr. Anscombe, as well as a newspaper article from the *Gloucester Daily Times* dated April 25, 1991, documenting the criminal incident in Massachusetts. He also reviewed Ms. Churchill's treatment records and the records of Dr. Balsom, as well as the mental status examination by Dr. Shellman. Tr. 236. Dr. Truhn diagnosed Bipolar I affective disorder, most recent episode depressed, moderate; panic disorder with agoraphobia; rule out cognitive disorder; and schizotypal personality disorder. Tr. 237.

Dr. Truhn concluded that the psychometric testing indicated strengths in abstract reasoning, general fund of knowledge and long term memory, but weakness in the area of visual transcription, a subtest that is "often associated with problems in concentration and attention." Tr. 238. The neuropsychological screening test

seemed to support "problems in concentration and attention, or that there is a possibility of cognitive deficit. It seems most likely at this time that there's a strong possibility that the psychotic symptoms are interfering in his cognitive processing." Id. Dr. Truhn thought the personality inventory seemed to represent his current psychological state, but "possibly with some exaggeration. The symptoms seem to be present and have been providing him with significant difficulty for many years." Id. Dr. Truhn concluded,

> It seems that Mr. Kimball is experiencing symptoms of a severe and persistent mental illness that has been affecting his interactions socially, vocationally, and academically for most of his adult life. It seems that his ability to maintain consistent competitive and employment [sic] is significantly impaired.

Id. Dr. Truhn wrote that Mr. Kimball's prognosis was poor. Id.

Dr. Truhn completed a Mental Residual Function Capacity (MRFC) Report. Tr. 239-40. In his opinion, Mr. Kimball was "markedly limited"[1] in the ability to: understand and remember detailed instructions; carry out detailed instructions; maintain attention and concentration for extended periods; perform activities within a schedule, maintain regular attendance, and be punctual; sustain an ordinary routine without special supervision; and complete a normal workday and workweek without interruption from psychologically based symptoms. Tr. 240. Dr. Truhn found Mr. Kimball moderately limited in several other areas. Id.

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[1] Defined on the form as "A limitation which precludes the ability to perform designated activity on a regular and sustained basis, i.e., 8 hours a day, 5 days a week, or an equivalent work schedule." Tr. 239.

On July 18, 2005, Mr. Kimball's employer, Robert Holvey, the owner of Boston Cabinets, wrote that Mr. Kimball had worked for him since July 13, 2004. Tr. 142. Mr. Holvey wrote that he was "aware of Scott's bi-polar disorder," and because of his disorder, Mr. Holvey had "given him the freedom to come and go as needed." Id. Mr. Kimball was working 20-25 hours a week. Id.

Hearing Testimony

Mr. Kimball testified that his mother pays for his medical treatment and for his treatment with Dr. Kalnins. Tr. 262. He said his work history between 1984 and 1999 consisted of a brief period of employment with Sears Roebuck in the shipping department; seasonal work at a ski area directing traffic in a parking lot and shoveling snow; tr. 265; a one-year period in which he sited water lines for the City of Concord, tr. 266; driving a taxi "off and on" for a "few years," tr. 266; working for a temporary service; working as a cashier at a café (a job from which he was fired), tr. 267; house sitting on a farm for six months, tr. 268; ground crew for a tree service, part-time for about six months, tr. 268; and bread delivery three hours a day for about two years, tr. 269. Mr. Kimball said he began working for Boston Cabinets in July 2004, after having done some yard work for the owner. Tr. 273. His job duties include assembling drawers, sanding, puttying, and shop cleanup. Tr. 274. The shop employs only three people, the owner, Mr. Kimball, and another employee who comes in two days a week. Tr. 274.

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Mr. Kimball said his current employer, Mr. Holvey, had confided to him that he too had experienced depression at times in his life, and that he had been "very helpful with allowing me to take time off when I need or come in late or leave early." Tr. 278. Mr. Kimball said he doubted he could do his job if his employer did not "offer that flexibility." Id.

Mr. Kimball said he was currently taking the generic form of Depakote and Clonazepam as necessary for anxiety. Tr. 283. He said he generally takes the Clonazepam about four times a month. Tr. 284. He attends a bipolar support group approximately twice a month. Tr. 288. He testified that Depakote helps alleviate the manic symptoms, but does nothing for his depression, anxiety, and agitation. Mr. Kimball said he had tried several other medications, including Risperdal, Zyprexa, Seroquel, and Lamictal, without relief. Tr. 290-91.

The ALJ questioned the vocational expert (VE) about a hypothetical individual Mr. Kimball's age, with some college education and with Mr. Kimball's work history, without exertional limitations, but unable to work with the general public. Tr. 296. The VE opined that such an individual could do some of Mr. Kimball's previous jobs, including construction worker, shipping and receiving clerk, tree trimmer helper, woodworker and shop hand, and delivery driver. Tr. 296. The ALJ then asked the VE to consider the additional limitation of being unable to have frequent interaction with co-workers. Tr. 297. The VE opined that such an

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individual could still do the same jobs, with the possible exception of delivery driver. Tr. 298.

Mr. Kimball's attorney asked the VE to consider whether an individual with the limitations found by Dr. Truhn could perform any of the jobs he cited. Tr. 299. The VE opined that Dr. Truhn's opinion that Mr. Kimball would have difficulty completing a normal workday and work week would rule out competitive employment. Tr. 299. The VE thought a person with a marked limitation in the ability to maintain attention and concentration could do some jobs, although probably not the previous employment previously cited. Tr. 300.

The VE also testified that competitive employment would require absences of no more than two days per month, and breaks of no more than 10-15 minutes two and a half hours into the shift, a lunch break of half an hour to an hour, and another afternoon break two and a half to three hours after the lunch break. Mr. Kimball's attorney asked, "If a person has the freedom to come and go as needed would that be considered an accommodation?" The VE responded that it would be. Tr. 300-301.

ALJ's Opinion

The ALJ found that Mr. Kimball had been engaged in substantial gainful activity (SGA) for the past year and had continued to engage in SGA through the date of the hearing. Tr. 15. But the ALJ also made a contradictory finding that Mr. Kimball "has not engaged in substantial gainful activity since the alleged onset of disability." Tr. 19. Mr. Kimball's alleged onset of disability is

March 14, 1999, the day after he received an unfavorable disability determination. There is no issue of SGA between March 14, 1999, and September 2004, as there is no evidence in the record of SGA for that time period. The court assumes that the ALJ's finding of SGA applies only to the period from September 2004 onward, and not to the period of alleged disability from March 14, 1999 to September 2004.

The ALJ's conclusion that Mr. Kimball had been engaged in SGA since 2004 was based on the evidence that Mr. Kimball earned approximately $1,200 per month. The ALJ noted that under 20 C.F.R. § 404.1574(b)(2) and 416.974(b)(2), average monthly earnings of more than $810 in 2004 and $830 in 2005 "ordinarily indicates that the individual has participated in [SGA]." Tr. 15.

The conclusion that Mr. Kimball was engaged in SGA after September 2004 ended the sequential analysis for that disability period at step one.

The ALJ continued the analysis for step two, presumably for the closed period of March 14, 1999 to September 2004. The ALJ found, at step two, that Mr. Kimball's bipolar disorder was a severe impairment, but accepted the MRFC assessments by psychologists Anderson and Rethinger in 2003 as the "foundation for the claimant's RFC." Tr. 16. Accordingly, the ALJ found that Mr. Kimball's only vocational impairments were limitations on interactions with coworkers and the public. Tr. 17. The ALJ

rejected the more restrictive RFC analysis of Dr. Truhn,[2] finding Dr. Truhn's report unconvincing because it recounted Mr. Kimball's "successful work activity," working an average of five hours a day for 25 hours a week; Mr. Kimball's "friendship with his employer;" Mr. Kimball's "involvement in a relationship with a woman for over four years;" and the belief by Dr. Balsom in 2002 that Mr. Kimball would be able to work full time if he had the "appropriate kind of work." Id. The ALJ found that Dr. Truhn's report "suggests and confirms the claimant's ability to work under appropriate circumstances, as well as some ability to interact appropriately with other people." Id.

The ALJ also rejected Dr. Kalnins's opinions that Mr. Kimball was "totally and permanently disabled," and that she expected him "to continue to have difficulties working." The ALJ found that her conclusions were "at odds with reality given that the claimant had been successfully engaging in [SGA] for nearly one year,"[3] and because her report was "merely conclusionary and ... unaccompanied by treatment or clinic notes." Id.

The ALJ did not accept Mr. Kimball's testimony because "overall," it did not "substantiate total disability, but only that he has restrictions in the kind of work environment in which he can be successful." Tr. 18. The ALJ noted that by October 1999, Mr.

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[2] Rendered in June 2005, despite the ALJ's earlier determination that Mr. Kimball's disability for the period between March 1999 and September 1, 2004 was under consideration.

[3] Again, an opinion rendered in June 2005, after the March 1999-September 2004 period under consideration for disability.

Kimball "reported that he was no longer having mood swings and he felt more in control." Id. The ALJ also noted Dr. Shellman's August 2003 report that Mr. Kimball's speech had a normal rhythm, with no evidence of thought blocking, flight of ideas or tangentiality. Id. The ALJ acknowledged that Mr. Kimball had reported increased depression in May 2000, but concluded that "this exacerbation coincided with very difficult financial circumstances; his employer had died." Id.

The ALJ found that Mr. Kimball's alleged degree of impairment was inconsistent with his range of activities. The ALJ relied on a chart note dated June 28, 1999 that Mr. Kimball was performing odd jobs, taking a trip to New Hampshire, using the computer, engaging in "mental health chats," and "making friends on the Internet." Tr. 18. The ALJ also noted reviewing psychologist Dr. Anderson's observation that Mr. Kimball was able to care for himself, lived with a significant other, able to prepare meals and help with housework, mow the lawn, wash dishes, handle money, shop, garden, watch TV, attend a bipolar support group twice a month, leave home at will, walk, go to the store, drive, and use a phone. Id.

The ALJ concluded that Mr. Kimball's symptoms "appear to be generally controlled through the use of medications." Tr. 18. The ALJ cited evidence that when Mr. Kimball restarted Depakote, he was less agitated and less anxious by February 2002, and by August 2002, chart notes reflected that his mood had stabilized. Id.

The ALJ concluded, on the basis of the VE's testimony, that Mr. Kimball was able to perform work with limited interactions with

coworkers or the public, and that his past relevant work as a tree trimmer helper and delivery driver satisfied those requirements. Accordingly, the ALJ found that Mr. Kimball was not disabled, again presumably for the closed period of March 14, 1999 to September 2004. Tr. 19-20.

Standard

The initial burden of proving disability rests on the claimant. Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995). To meet this burden, the claimant must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which ... has lasted or can be expected to last for a continuous period of not less than 12 months[.]" 42 U.S.C. § 423(d)(1)(A).

A physical or mental impairment is "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). This means an impairment must be medically determinable before it is considered disabling.

The Commissioner has established a five-step sequential process for determining whether a person is disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1520, 416.920.

In step one, the Commissioner determines whether the claimant has engaged in any substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is, disability benefits are denied. Yuckert, 482 U.S. at 140; 20 C.F.R. §§ 404.1520(b), 416.920(b).

If not, the Commissioner goes to step two, to determine whether the claimant has a "medically severe impairment or combination of impairments." Yuckert, 482 U.S. at 140-41; 20 C.F.R. §§ 404.1520(c), 416.920(c). That determination is governed by the "severity regulation," which provides:

> If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.

§§ 404.1520(c), 416.920(c). If the claimant does not have a severe impairment or combination of impairments, the disability claim is denied.

If the impairment is severe, the evaluation proceeds to the third step. Yuckert, 482 U.S. at 141. In step three, the Commissioner determines whether the impairment meets or equals "one of a number of listed impairments that the [Commissioner] acknowledges are so severe as to preclude substantial gainful activity." Yuckert, 482 U.S. at 140-41. If a claimant's impairment meets or equals one of the listed impairments, he is considered disabled without consideration of her age, education or work experience. 20 C.F.R. s 404.1520(d), 416.920(d).

If the impairment is considered severe, but does not meet or equal a listed impairment, the Commissioner considers, at step four, whether the claimant can still perform "past relevant work." 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant can do so, he is not considered disabled. Yuckert, 482 U.S. at 141-42.

If the claimant shows an inability to perform his past work,

the burden shifts to the Commissioner to show, in step five, that the claimant has the residual functional capacity to do other available work in consideration of the claimant's age, education and past work experience. Yuckert, 482 U.S. at 141-42; 20 C.F.R. §§ 404.1520(f), 416.920(f).

Discussion

1. Is Mr. Kimball engaged in SGA?

The ALJ found, at step one of the sequential analysis, that Mr. Kimball was engaged in SGA after September 2004. SGA is work done for pay or profit that involves significant mental or physical activities. 20 C.F.R. § 404.1571-72 & 416.971-75; Lewis v. Apfel, 236 F.3d 503, 515 (9th Cir. 2000). Earnings are a presumptive, but not conclusive, sign of whether a job constitutes SGA. Lewis, 236 F.3d at 515. Monthly earnings averaging less than $300 generally show that a claimant has not engaged in substantial gainful activity. 20 C.F.R. §§ 404.1574(b)(3), 416.974(b)(3). At the other end of the spectrum, monthly earnings averaging more than $500 generally show that a claimant has engaged in substantial gainful activity. 20 C.F.R. §§ 404.1574(b)(2), 416.974(b)(2); Lewis 236 F.3d at 515. Mr. Kimball's earnings are high enough to generate a presumption of SGA.

But the "mere existence of earnings over the statutory minimum is not dispositive." Keyes v. Sullivan, 894 F.2d 1053, 1056 (9th Cir. 1990). The claimant may rebut a presumption based on earnings with evidence of his "inability to ... perform the job well, without special assistance, or for only brief periods of time." Id. The regulations list the following factors to be considered: the

nature of the claimant's work, how well the claimant does the work, if the work is done under special conditions, if the claimant is self-employed, and the amount of time the claimant spends at work. 20 C.F.R. §§ 404.1573 & 416.973; *see also* Katz v. Secretary of Health and Human Servs., 972 F.2d 290, 293 (9th Cir. 1992)(citing regulations and listing factors that claimant could use to overcome high-earnings presumption). The regulations specifically provide, as examples of "special conditions," a claimant who is "allowed to work irregular hours or take frequent rest periods," or an employer who exhibits concern for the claimant's welfare. 20 C.F.R. §§ 404.1573 (c)(2), (c)(6). See also SSR 05-02 (special conditions "may be evidenced in many ways," including being allowed to work irregular hours or granted the opportunity to work, despite claimant's condition, for "altruistic reason.")

The question presented by Mr. Kimball's challenge to the ALJ's step one finding that he was engaged in SGA is whether he has overcome the high-earnings presumption to carry his burden of establishing at step one of the sequential analysis that he is not engaged in SGA. The ALJ found that Mr. Kimball works approximately 20-25 hours a week, or four to five hours a day. A five-hour work day can support an SGA finding. Keyes, 894 F.2d at 1056.

Mr. Kimball has proffered rebuttal evidence on the factors of whether the work is done under special conditions and how well he does the work. The most important evidence is that Mr. Kimball's employer gives him "special consideration in performing his job," cf. Byington v. Chater, 76 F.3d 246, 250-51 (9th Cir. 1996), including allowing him to limit his work hours and permitting him

to come and go apparently at will--the latter a circumstance which, according to the VE's testimony, would be considered an accommodation, rather than a feature of competitive employment. Mr. Holvey has specifically stated that he allows Mr. Kimball to come and go as necessary because of his bi-polar disorder.[4]

The ALJ made no reference to Mr. Holvey's evidence, a clear error. See Stout v. Commissioner, 454 F.3d 1050, 1056 (9th Cir. 2005)(ALJ erred in failing to address competent lay testimony favorable to the claimant; error not harmless unless court can conclude that no reasonable ALJ, when fully crediting the testimony, could have reached a different disability determination).

Other evidence challenging the presumption of SGA is the medical evidence from examining psychologist Truhn and treating physician Kalnins. Dr. Truhn concluded, after reviewing records, conducting a clinical interview, and administering psychological tests, that Mr. Kimball's "ability to maintain consistent competitive and employment [sic] is significantly impaired," and that he had "marked" limitations in the ability to remember and carry out detailed instructions; maintain attention and concentration for extended periods; maintain regular attendance; sustain an ordinary routine without special supervision; and

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[4] I note that the ALJ even made a finding that in May 2000, Mr. Kimball had reported increased depression to his doctor, an exacerbation of symptoms that "coincided with very difficult financial circumstances; his employer had died." This finding by the ALJ provides evidentiary support for the inference that Mr. Kimball's ability to engage in SGA was dependent on working for a particular employer.

complete a normal workday and workweek. Dr. Kalnins concluded, on the basis of a several-year treatment history, that Mr. Kimball had been able to do limited work "only because he has had an unusual amount of flexibility with the jobs."

The ALJ failed to consider the evidence from Mr. Holvey that Mr. Kimball is given special consideration in performing his job. The court cannot weigh the evidence to determine whether the statement of Mr. Holvey, along with the medical evidence from Doctors Truhn and Kalnins, overcomes the earnings presumption. As discussed further below, I conclude that the issue of whether Mr. Kimball was engaged in SGA from September 2004 forward must be remanded to the Commissioner so that the ALJ can make a determination about whether Mr. Kimball has overcome the earnings presumption with this evidence, and is therefore entitled to benefits for the period from September 2004 forward.

Mr. Kimball argues that even if his work at Boston Cabinets were found to be SGA, the ALJ erred in failing to award benefits for a closed period between March 1999 and his employment beginning September 2004. I agree. The following analysis applies to that closed period.

2. ALJ's rejection of opinions of Dr. Truhn and Dr. Kalnins

Mr. Kimball asserts that the ALJ erred in rejecting the opinions of Doctors Truhn and Kalnins in favor of the opinions of reviewing psychologists Doctors Anderson and Rethinger.

Title II's implementing regulations distinguish among the opinions of three types of physicians: 1) those who treat the claimant, such as Dr. Kalnins and Dr. Balsom; 2) those who examine

but do not treat, such as Dr. Truhn; and 3) those who neither examine nor treat, such as Doctors Anderson and Rethinger. See Holohan v. Massanari, 246 F.3d 1195, 1201 (9th Cir. 2001); Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995); 20 C.F.R. § 404.1527(d). Generally, a treating physician's opinion carries more weight than an examining physician's and an examining physician's opinion carries more weight than a reviewing physician's. Holohan 246 F.3d at 1202; Lester, 81 F.3d at 830; 20 C.F.R. § 404.1527(d). In addition, the regulations give more weight to opinions that are explained than to those that are not, Holohan 246 F.2d at 1202, 20 C.F.R. § 404.1527(d), and to the opinions of specialists concerning matters relating to their specialty over that of nonspecialists, Holohan, 246 F.3d at 1202, § 404.1527(d)(5).

In disability benefits cases, physicians typically provide two types of opinions: medical opinions that speak to the nature and extent of a claimant's limitations, and opinions concerning the ultimate issue of disability, i.e., opinions about whether a claimant is capable of any work, given her or his limitations. Holohan, 246 F.3d at 1202. Under the regulations, if a treating physician's medical opinion is supported by medically acceptable diagnostic techniques and is not inconsistent with other substantial evidence in the record, the treating physician's opinion is given controlling weight. Id.; 20 C.F.R. § 404.1527(d)(2); Social Security Ruling (SSR) 96-2p. If the treating physician's medical opinion is contradicted by other substantial evidence in the record, treating source medical opinions are still entitled to deference and must be weighed using all the factors

provided in 20 C.F.R. § 404.1527. Id., citing SSR 96-2p.

An ALJ may rely on the medical opinion of a non-treating doctor instead of the contrary opinion of a treating doctor only if the ALJ provides "specific and legitimate" reasons supported by substantial evidence in the record. Id. In other words, a reviewing physician's opinion may not constitute substantial evidence justifying rejection of a treating or examining physician's opinion unless it is "supported by other evidence of the record and is . . . consistent with it." Lester, 81 F3d at 83; Morgan v. Comm'r, 169 F.3d 595, 600 (9th Cir. 1999).

The opinion of reviewing psychologist Dr. Anderson, affirmed by Dr. Rethinger, that Mr. Kimball had no vocational limitations other than on his ability to understand and remember detailed instructions and to interact with coworkers and the general public, is not consistent with other evidence from mental health practitioners. Dr. Shellman opined that Mr. Kimball's demeanor and presentation were consistent with his complaints of, among other things, problems at work, problems with concentration and memory functioning, confusion, quick change of mood, problems controlling anger or urges, feelings of worthlessness, and withdrawal from others. Dr. Kalnins opined in June 2005, based on several years of prior treatment, that Mr. Kimball was "totally and permanently psychiatrically disabled," and would "continue to have difficulties working." Dr. Truhn concluded that Mr. Kimball's psychotic symptoms interfered with cognitive processing and significantly impaired his ability to maintain consistent competitive employment; Dr. Truhn specifically found that Mr. Kimball had marked limitations in the

ability to understand and remember detailed instructions, carry out detailed instructions, maintain attention and concentration for extended periods, perform within a schedule, maintain regular attendance, sustain an ordinary routine, and complete a normal workday and workweek.[5]

The opinions of Doctors Anderson and Rethinger are inconsistent with other opinion evidence that is entitled to significantly more evidentiary weight. Further, Dr. Truhn's opinions are extensively explained and supported through testing. The opinions of Doctors Anderson and Rethinger are not sufficient to support the ALJ's RFC findings and they do not constitute specific and legitimate reasons for rejecting the opinions of Doctors Kalnins and Truhn.

The ALJ's stated reasons for rejecting Dr. Kalnins's opinions were that they were 1) unaccompanied by treatment notes and 2) "at odds with reality, given that the claimant had been successfully engaging in [SGA] for nearly one year."

Under the regulations, opinions that are explained are given more weight than those that are not. 20 C.F.R. § 404.1527(d); see also Holohan, 246 F.3d at 1202. But this authority does not mean the ALJ is free to reject Dr. Kalnins's opinions entirely on that basis, particularly since the ALJ rejected them in favor of equally summary opinions from Doctors Anderson and Rethinger.

The ALJ's rejection of Dr. Kalnins's report because it was "at odds with reality" is neither specific, nor legitimately based on

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[5] Dr. Truhn's evaluation of Mr. Kimball was done in June 2005, after Mr. Kimball began working.

substantial evidence in the record. Dr. Kalnins's 2005 letter shows that she was aware Mr. Kimball was at that time working for a cabinetmaker. Nevertheless, Dr. Kalnins discounted Mr. Kimball's ability to do "limited work" on the ground that he was able to do so "only because he has had an unusual amount of flexibility with the jobs," which enabled him not to come to work when he was experiencing mental symptoms. Dr. Kalnins considered the fact that Mr. Kimball was working in arriving at her conclusions; her opinions cannot be rejected on the basis articulated by the ALJ.

The ALJ rejected the RFC findings of Dr. Truhn because 1) Dr. Truhn was aware that Mr. Kimball was working part-time; 2) Mr. Kimball had a friendship with his employer; 3) Mr. Kimball was engaged in a "relationship with a woman;" and 4) Dr. Balsom stated in 2002 that Mr. Kimball could work full time if he had the "appropriate kind of work." These reasons are not sufficient to reject Dr. Truhn's opinions.

I note that according to Dr. Truhn's report, Mr. Kimball stated that he "currently has one friend and that is his employer at his part time job." Tr. 231. Mr. Kimball also said that he and his employer did not socialize outside the work environment. Id. That Mr. Kimball had a friend in his employer is not a sufficient reason to reject a psychologist's opinions on vocational limitations imposed by mental illness; in fact, the friendship between Mr. Kimball and his employer supports the inference that Mr. Kimball's ability to work was dependent upon a sympathetic employer. Mr. Kimball's romantic relationship with a woman is not a sufficient reason to reject Dr. Truhn's opinions on vocational

limitations. The ability to maintain close relationships with family and friends is "not the same as being able to work with people who are less likely to know about or understand [the claimant's] limitations," and thus does not constitute clear and convincing evidence that, contrary to the opinions of his treatment providers, Mr. Kimball could function normally in work and social settings. See Lewis v. Apfel, 236 F.3d 503, 517 (9th Cir. 2001). It should not require stating that to be disabled does not require the claimant to be friendless and without any significant relationships.

Dr. Balsom is not a mental health specialist; he is a general medical practitioner. As a non-specialist, Dr. Balsom's opinion about Mr. Kimball's mental limitations is entitled to less weight than those of the mental health specialists. Further, his opinion that Mr. Kimball could work full time if he had the "appropriate kind" of work is too ambiguous to constitute substantial evidence contradicting the opinions of Doctors Kalnins and Truhn that Mr. Kimball could only work when he had an "unusual amount of flexibility," or that Mr. Kimball was unable to maintain regular attendance, sustain an ordinary routine without special supervision, or complete a normal work day and work week without interruption from psychologically based symptoms.

The ALJ's rejection of Dr. Truhn's report because it suggested "some ability to interact appropriately with other people" conflicts with the ALJ's own finding, based on Dr. Anderson's records review, that Mr. Kimball was not able to work at jobs that

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required contact with the general public or more than occasional contact with coworkers.

The ALJ's reasons for rejecting the opinions of Doctors Kalnins and Truhn are not supported by substantial evidence in the record. Accordingly, the opinions of Doctors Kalnins and Truhn are accepted as true. See Lester, 81 F.3d at 834 (where Commissioner fails to provide adequate reasons for rejecting the opinion of a treating or examining physician, court credits that opinion as a matter of law.); Hammock v. Bowen, 867 F.2d 1209, 1213 (9th Cir. 1989).

3. Rejection of Mr. Kimball's testimony

The ALJ rejected Mr. Kimball's testimony because 1) "overall, the claimant's testimony does not substantiate total disability, but only that he has restrictions in the kind of work environment in which he can be successful;" 2) in October 1999, Mr. Kimball reported that he was no longer having mood swings and felt more in control; 3) in August 2003, Dr. Shellman wrote that Mr. Kimball's speech had a normal rhythm and there was no evidence of thought blocking, flight of ideas or tangentiality; 4) Mr. Kimball's increased depression in May 2000 "coincided with very difficult financial circumstances; his employer had died;" 5) Mr. Kimball's testimony was inconsistent with his range of activities reported in June 1999, which included the performance of odd jobs, taking a trip to New Hampshire, using the computer, engaging in "mental health chats," and making friends on the internet; 6) his activities of daily living included self-care, preparing meals, helping with housework, mowing the lawn, washing dishes, handling

money, shopping, gardening, watching TV, attending a support group twice a month, leaving home at will, fishing, walking, driving, and using the phone; 7) his symptoms were "generally controlled through the use of medications" because after resuming Depakote in February 2002 he was "less agitated and less anxious" and a chart note dated August 2002 reflected that his mood had stabilized with the use of Depakote.

The ALJ's credibility findings must be supported by specific, cogent reasons. Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998). Unless there is affirmative evidence showing that the claimant is malingering, the Commissioner's reasons for rejecting the claimant's testimony must be "clear and convincing." Id. The ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints. Id. The evidence upon which the ALJ relies must be substantial. Id. at 724. See also Holohan, 246 F.3d at 1208. General findings (e.g., "record in general" indicates improvement) are an insufficient basis to support an adverse credibility determination. Reddick 157 F.3d at 722; Holohan, 246 F.3d at 1208.

There is no evidence in the record that Mr. Kimball is malingering. I therefore consider whether the ALJ's reasons for rejecting Mr. Kimball's testimony are clear and convincing.

One of the ALJ's findings is based on a single chart note from October 1999 in which Mr. Kimball reported he was "no longer having mood swings and ... felt more in control." But a physician's statements must be read in context of the overall diagnostic picture. Holohan, 246 F.3d at 1205. That a single chart note

indicates a claimant--whom the ALJ has determined to have bipolar disorder that is severe--has made some improvement does not mean that the claimant's impairments no longer seriously affect his ability to function in a workplace. Id.

The same analysis applies to the ALJ's reliance on Dr. Shellman's recorded observation that Mr. Kimball's speech was of normal rhythm without evidence of thought blocking, flight of ideas, tangentiality or circumstantial ideation. This isolated observation, even if it were relevant to the existence or severity of bipolar disorder, does not undermine Mr. Kimball's credibility. Dr. Shellman concluded in the same report that Mr. Kimball's presentation and demeanor were consistent with the medical records and with Mr. Kimball's allegations. Dr. Shellman diagnosed Mr. Kimball with Bipolar I Disorder and gave his prognosis as "guarded."

Several of the ALJ's findings are based on activities that are purportedly inconsistent with Mr. Kimball's stated symptoms. Some of these activities are sporadic (performing odd jobs, taking a trip to New Hampshire, attending a bipolar support group twice a month), while others are both sporadic and require little if any personal interaction with others (using the computer, making friends on the internet, watching television). None of these activities is inconsistent with Mr. Kimball's symptoms of depression, anxiety and agitation, and none supports a finding that Mr. Kimball is capable of sustaining competitive employment on a continuous basis.

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The ALJ found that Mr. Kimball's symptoms were "generally" controlled through the use of medications, but cites only the statement by Mr. Kimball that after restarting Depakote in February 2002, he was "less agitated and less anxious." This statement does not support a finding that Mr. Kimball's symptoms are controlled through the use of medication, particularly in view of the other evidence in the record that Depakote controls only Mr. Kimball's manic symptoms. See, e.g., Kimball's testimony, tr. 290-91 (Depakote helps alleviate manic symptoms but does nothing for depression, anxiety and agitation; other medications, including Risperdal, Zyprexa, Seroquel, and Lamictal ineffective); tr. 228 (Dr. Kalnins's statements that none of Mr. Kimball's various treatments had been consistently helpful; that he had "periods of time when he has fewer mood swings and disturbing thoughts," but had never had "prolonged relief from these symptoms;" and that "[a]ntidepressant medications have not been helpful"); tr. 222 (Dr. Balsom's note that Mr. Kimball had been tried on Remeron, Lamictal and Seroquel without improvement, and with significant adverse reactions).

As discussed above, the ALJ's finding that Mr. Kimball was depressed in May 2000 because of financial difficulties created by the death of his employer is, if anything, indicative of the validity of Dr. Kalnins's opinion that Mr. Kimball's ability to work was dependent on the flexibility of particular employers. In view of the ALJ's finding that Mr. Kimball was impaired by severe bipolar disorder, Mr. Kimball's statement that his depression was

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made worse by the death of his employer does not disprove Mr. Kimball's symptom testimony.

With respect to the ALJ's findings that Mr. Kimball was not credible because his daily activities included self care, meal preparation, helping with housework, mowing the lawn, washing dishes, handling money, shopping, gardening, driving, using the telephone, and walking, the cases caution that disability claimants are not to be penalized for attempting to lead normal lives in the face of their limitations. Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998). A disability claimant need not "vegetate in a dark room excluded from all forms of human and social activity" in order to be deemed eligible for benefits. Cooper v. Bowen, 815 F.2d 557, 561 (9th Cir. 1987); Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989). Activities that include taking care of oneself, performing household chores, and engaging in hobbies and therapy do not disprove disability. Corrao v. Shalala, 20 F.3d 943 (9th Cir. 1994)(as modified on limited grant of rehearing); Ratto v. Secy, 839 F. Supp. 1415 (D. Or. 1993). See also Vertigan v. Halter, 260 F.3d 1044 (9th Cir. 2001)(rejecting ALJ's credibility findings based on claimant's ability, despite back condition, to go grocery shopping with assistance, walk approximately one hour in malls, swim, watch television, and read).

The ALJ's reasons for rejecting Mr. Kimball's testimony are not clear and convincing. I therefore credit the testimony as true. Varney v. Secretary of Health and Human Services, 859 F.2d 1396, 1398-99 (9th Cir. 1988); Lester, 81 F.3d at 834(claimant's testimony credited when improperly rejected by ALJ).

4. Remand

In Smolen v. Chater, 80 F.3d 1273, 1292 (9th Cir. 1996), the court held that improperly rejected evidence should be credited and an immediate award of benefits made when: 1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence, 2) there are no outstanding issues that must be resolved before a determination of disability can be made, and 3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited. If the Smolen test is satisfied, then remand for payment of benefits is warranted.

These three conditions are met with respect to the disability period between March 1999 and September 2004. The opinion testimony of Doctors Kalnins and Truhn, and the testimony of Mr. Kimball, if credited, would require a finding of disability. As for the period from September 2004 forward, remand is necessary so that the ALJ can consider the evidence of Mr. Holvey and determine whether Mr. Kimball has overcome the earnings presumption of SGA.

Conclusion

I recommend that the Commissioner's decision be reversed and remanded for the payment of benefits for the period March 1999 to September 2004. I recommend that this case be remanded to the Commissioner for further administrative proceedings on the issue of SGA for the period of September 2004 forward.

Scheduling Order

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due February 28, 2008. If no objections are filed, review of the

Findings and Recommendation will go under advisement on that date. If objections are filed, a response to the objections is due March 13, 2008, and the review of the Findings and Recommendation will go under advisement with the District Judge on that date.

Dated this 13th day of February, 2008.

/s/ Dennis James Hubel

Dennis James Hubel
United States Magistrate Judge